No. 97-934

In The

Supreme Court of the United States

October Term, 1997

GEORGE VOINOVICH, et al.,

Petitioners,

v.

WOMEN'S MEDICAL PROFESSIONAL CORP., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, CALIFORNIA, GEORGIA, IDAHO, ILLINOIS, LOUISIANA, MISSISSIPPI, NEBRASKA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

GRANT WOODS
Attorney General
State of Arizona
PAULA S. BICKETT*
Assistant Attorney General
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-3333
Counsel for the State of Arizona

Other Counsel Listed
Inside Front Cover

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Bill Pryor
Attorney General
State of Alabama
Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

Daniel E. Lungren
Attorney General
State of California
Department of Justice
1300 I Street, Suite 125
P. O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

Michael J. Bowers
Attorney General of Georgia
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334-1300
(404) 656-4585

Alan G. Lance
Idaho Attorney General
P. O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

James E. Ryan
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, IL 60601
(312) 814-2503

Richard P. Ieyoub
Attorney General of Louisiana
P. O. Box 94005
Baton Rouge, LA 70804
(504) 342-7013

Mike Moore
Attorney General of Mississippi
Office of the Attorney General
Department of Justice
Post Office Box 220
Jackson, MS 39205-0220
(601) 359-3692

Don Stenberg
Nebraska Attorney General
Department of Justice
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

D. Michael Fisher
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1144

Jeffrey B. Pine
Attorney General
State of Rhode Island
Office of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

Charlie M. Condon
Attorney General of South Carolina
Office of the Attorney General
Rembert C. Dennis Office Building
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3970

Mark Barnett
Attorney General of South Dakota
Office of the Attorney General
500 East Capitol
Pierre, SD 57501-5070
(605) 773-3215

John Knox Walkup
Attorney General and Reporter
State of Tennessee
Office of the Attorney General
425 Fifth Avenue North
Nashville, TN 37243-0485
(615) 741-6474

Jan Graham
Attorney General of Utah
Office of the Attorney General
State Capitol
Room 236
Salt Lake City, UT 84114-0810
(801) 538-1326

Mark L. Earley
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219
(804) 786-2071

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INTEREST OF THE AMICI CURIAE STATES

Amici States are interested in protecting potential life by regulating abortions within the parameters of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Several States, including Ohio and a number of the amici States, have attempted carefully – and democratically – to effectuate that interest by regulating the rarely used, late-term abortion procedure known as Dilation and Extraction (D&X)[1] or "partial-birth" abortion[2] or

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[1] The D&X procedure is typically used late in the second trimester, between the twentieth and twenty-fourth week of pregnancy. *Women's Medical Professional Corporation v. Voinovich*, 130 F.3d 187, 212 (6th Cir. 1997); A-22-23. The cervix is dilated for two days and on the third day, the doctor removes, intact, all but the head of the fetus from the vagina, and then, the doctor forces scissors into the base of the skull, places a suction catheter into the scissor hole, and evacuates the skull contents. *Id.* The American Medical Association has recently concluded that the partial-birth method for aborting a fetus "is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." A-59 (Boggs, J., dissenting) (quoting AMA Board of Trustees Statement of May 19, 1997).

[2] The nineteen states with partial-birth abortion statutes include 1997 Ala. Acts 485; Alaska Stat. § 18.16.050; Ariz. Rev. Stat. Ann. § 13-3603.01; 1997 Ark. Acts 984; Ga. Code Ann. § 16-12-144; 720 Ill. Comp. Stat. Ann. §§ 513/1 through 513/20; Ind. Code Ann. § 16-18-2-267.5 and 16-34-2-1(b); 1997 La. Acts 906, La. Rev. Stat. Ann. §§ 14:32.9 and 40:1299.35.3; Mich. Comp. Laws Ann. §§ 333.16221(l) & (m), 333.16226, 333.17016, and 333.17516; Miss. Code Ann. § 41-41-73; Mont. Code Ann. 50-20-401; Neb. Rev. Stat. §§ 28-325, 28-326(9) and 71-148; N.J. Stat. Ann. §§ 2A:65A-5 through 2A:65A-7; Ohio Rev. Code Ann. § 2919.15; R.I. Gen. Laws §§ 23-4.12-1 through 23-4.12-6; S.C. Code Ann. § 44-41-85; S.D. Codified Laws §§ 34-23A-27 to -33; Tenn. Code Ann. § 39-15-209; Utah Code Ann. § 76-7-310.5.

by limiting post-viability abortions.[3] Other States, also including a number of amici, are considering such enactments.

The States' ability to regulate in this area of vital interest is stymied, however, by the decision of the court of appeals in this case, and by district court decisions[4] that strike down such "partial-birth" legislation facially by accepting the invitation of the challengers to the legislation to construe it so as to ensure a finding of unconstitutionality rather than accepting the State's proffered constitutional construction. Given the already difficult task of determining the scope of permissible abortion

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Thirteen of these states join this Brief for purposes of urging the Court to hear this case.

[3] States which regulate post-viability or third trimester abortions include 1997 Ala. Acts 442; Ariz. Rev. Stat. Ann. § 36-2301.01(A); Ark. Code Ann. § 20-16-705; Cal. Health & Safety Code §§ 123405, 123410, 123415, 123435; Conn. Gen. Stat. Ann. § 19a-602(b); D.C. Code § 22-201; Del. Code Ann. tit. 24, § 1790(a)(1) & (b)(1); Fla. Stat. Ann. § 390.0111(1) & (4); Ga. Code Ann. § 16-12-141(c); Idaho Code § 18-608(3); 720 Ill. Comp. Stat. Ann. § 510/5; Ind. Code Ann. §§ 16-34-2-1(a)(3) and 16-34-2-3; Iowa Code Ann. § 707.7; Kan. Stat. Ann. § 65-6703; Ky. Rev. Stat. Ann. § 311.780; La. Rev. Stat. Ann. § 40:1299.35.4; Me. Rev. Stat. Ann. tit. 22, § 1598; Minn. Stat. Ann. § 145.412(3); Mo. Ann. Stat. § 188.030(1); Mont. Code Ann. § 50-20-109(c); Neb. Rev. Stat. § 28-329; N.Y. Penal Law §§ 125.00, 125.05 and 125.45; N.C. Gen. Stat. § 14-45.1; Ohio Rev. Code Ann. § 2919.17; Okla. Stat. Ann. tit. 63, § 1-732; 18 Pa. Cons. Stat. Ann. § 3210; R.I. Gen. Laws § 11-23-5; S.D. Codified Laws § 34-23A-5; Tenn. Code Ann. § 39-15-201(c)(3); Wis. Stat. Ann. § 940.15; Wyo. Stat. Ann. § 35-6-102.

[4] *See, e.g., Planned Parenthood of Southern Arizona v. Woods*, No. CIV. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997).

regulation under this Court's decisions, the lower courts' improper application of the standard for facial challenges to abortion regulations renders many State legislatures' task of drafting constitutional language to regulate abortion nearly impossible.[5] Like the dissenting circuit judge in this case, amici States believe that "[this] Court meant what it said in permitting state abortion regulations in certain contexts." A-56. Because the signatory States are vitally interested in knowing and preserving the scope of legitimate State action under *Casey*, these amici join Ohio in urging this Court to grant the Petition for Certiorari in this case.

At minimum, certiorari should be granted to provide States and lower courts much-needed guidance as to the appropriate standard of review in facial challenges to State statutes. Many circuits, as well as members of this Court, have concluded that *Casey* silently overruled *United States v. Salerno*, 481 U.S. 739 (1987), which required plaintiffs in facial challenges to show that "no set of circumstances" exists in which the challenged statute may be constitutionally applied. Instead, a more lenient test has been used, requiring challengers to establish unconstitutionality in only a "large fraction" of cases. Other courts, commentators, and Justices have maintained the continuing vitality of *Salerno*, and indeed, the Court recently has cited *Salerno* approvingly in non-abortion contexts. *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995). The Sixth Circuit not only joined the side of the

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[5] As cogently noted by Judge Boggs in this case, "any set of words chosen by the Ohio legislature would have been challenged on vagueness grounds." A-60 (Boggs, J., dissenting).

split rejecting *Salerno*, but it also broke new ground by extending the "large fraction" test beyond its "undue burden" roots and applying it in the entirely separate area of vagueness. The States are interested in resolving this confusion and split of authority in the abortion area. The States also are concerned about the trend in some courts to extend this *Casey*-trumps-*Salerno* logic to new areas of the law.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Widens the Split of Authority on Standards of Review in Abortion and Vagueness Cases.

The Petition in this case compellingly identifies the conflict of authority on the appropriate standard for reviewing a facial challenge to an abortion regulation. The traditional rule for assessing a facial challenge is summarized in *Salerno*, requiring a challenger to "establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. Additionally, in several abortion decisions, this Court has applied a "no set of circumstances" test in assessing facial challenges to a statute. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990); *see also Webster v. Reproductive Health Serv.*, 492 U.S. 490, 524 (1989) (O'Connor, J., concurring in part and concurring in the judgment). Without explicitly overruling these cases, *Casey* affirmed the facial invalidation of a spousal notification requirement because the statute would operate as a substantial obstacle to a woman's choice to undergo an abortion in a "large fraction" of the

cases in which the statute was relevant. 505 U.S. at 895. Since *Casey*, several Justices have commented on the need for further review of this issue. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 116 S. Ct. 1582, 1584-85 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari). *But see id.* at 1583 (Stevens, J., concurring in denial of certiorari) (opining that the articulation of the standard for facial challenges in *Salerno* was *dicta* and therefore properly ignored); *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Conner, J., joined by Souter, J., concurring in denial of stay) (indicating that *Salerno* is inconsistent with *Casey*).

The federal courts of appeals also have adopted different positions on whether *Casey* modifies the *Salerno/Rust/Akron* standard. On one hand, two courts of appeals have agreed with the Sixth Circuit's conclusion that *Casey* effectively overrules *Salerno*. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997); *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (*dicta*).

In contrast to these appellate courts, the Fifth Circuit has concluded that *Casey* did not overrule the traditional rule for assessing facial challenges. *See Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir.) ("we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes"), *cert. denied*, 506 U.S. 1021 (1992); *accord Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1104 (5th Cir.) ("As far as we can tell, the Court appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire

that result"), *cert. denied*, 118 S. Ct. 357 (1997). The Fourth Circuit has gone out of its way to indicate its agreement with the Fifth Circuit that *Salerno* still governs. *See Manning v. Hunt*, 119 F.3d 254, 268-69 n.4 (4th Cir. 1997) ("the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive") (*dicta*).

The Eighth Circuit is itself split on the issue. One Eighth Circuit panel, uncertain of the effect of *Casey* on the *Salerno* standard, analyzed the challenged abortion statute first under *Salerno* and then as if the *Casey* "large fraction" test replaced *Salerno*. *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 529-30 (8th Cir. 1994). Another Eighth Circuit panel applied the standard in *Casey* to facially invalidate an abortion regulation. *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1582 (1996). This intra-circuit split dramatically demonstrates the extent of the confusion regarding the appropriate standard to be applied after *Casey*.

In addition to the *Salerno/Casey* division of authority, this case reveals another split, which the Sixth Circuit has now widened as well. In assessing facial attacks on allegedly vague statutes, the Supreme Court has stated that it will reject the challenge unless the enactment is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). The Sixth Circuit, however, assessed claimants' vagueness challenge to the restrictions on the D&X procedure and post-viability abortions under a different standard: "General standards governing vagueness

challenges suggest that a statute with vagueness problems that could chill constitutional freedoms should be held unconstitutionally vague. [Citations omitted.] Since we have already held that *Salerno* does not apply in the abortion context, it is enough that the statute may be unconstitutionally applied to a large fraction of women for whom the law is relevant." A-39 n.18.

This extension of the *Casey* overbreadth standard to vagueness is contrary to other Supreme Court precedents governing vagueness challenges. *See, e.g., Chapman v. United States*, 500 U.S. 453, 467 (1991) ("vagueness claim[s] must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by [the statute]"); *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975). *But cf. Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983) (suggesting overbreadth analysis may apply whenever there is any "constitutionally protected conduct" at issue); *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979). And, the Sixth Circuit approach directly conflicts with *Hoffman Estates*.

In addition, several circuit courts have applied a different standard of review from the one applied by the Sixth Circuit. *See, e.g., United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997) ("[a] vagueness challenge . . . cannot be aimed at the statute on its face but must be limited to the application of the statute to the particular conduct charged"); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996) (plaintiffs can only succeed "on a facial vagueness challenge if they could show that the law is impermissibly vague in all of its

applications") (internal quotation omitted); *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (a facial challenge on vagueness grounds "is a claim that the law is invalid *in toto* – and therefore incapable of any valid application") (internal quotation omitted); *Stoianoff v. Montana*, 695 F.2d 1214, 1220 (9th Cir. 1983) ("All that we must find to sustain the facial constitutionality of the Act is a single clear application of the Act to the appellant."). *Cf. New England Accessories Trade Assn, Inc. v. City of Nashua*, 679 F.2d 1, 5 (lst Cir. 1982) ("unless the enactment implicates constitutionally protected conduct, we can invalidate it only if it is impermissibly vague in all of its applications").

The Sixth Circuit's adoption and extension of the *Casey* standard to strike down the Ohio statute, which could have been construed to avoid constitutional problems, demonstrates the critical need for this Court's review and clarification of the appropriate standard to be applied in abortion and vagueness cases. Without review and clarification, those States in the circuits that have concluded that *Casey* modifies *Salerno* may be effectively precluded from regulating abortions to further their interest in potential life.

II. The Petition Should be Granted to Clarify that States May Regulate Partial-Birth and Post-Viability Abortions.

The significance of the questions presented also warrants review. The Court has not yet considered the validity of limitations on partial-birth abortions. Nor has it

determined whether a mental health exception is constitutionally required when it comes to restrictions on post-viability abortions, or whether, since *Casey*, a law restricting post-viability abortions must include a scienter requirement. And, for six years now, the lower courts have remained uncertain regarding the appropriate standard for reviewing claims such as these.

The Sixth Circuit applied a vagueness standard that seems to guarantee the statute's demise. Relying on *Casey*, the court facially invalidated both pre-and post-viability abortion statutes because the statute *may* be unconstitutionally applied to a large fraction of the women for whom the law is relevant. A-39 n.18. Without this Court's review of this erroneous decision, the democratic efforts of an overwhelming majority of Ohio's citizens to express their collective concerns about partial-birth and post-viability abortions will be nullified. This nullification will not be limited to Ohio, however, as eighteen other States have enacted partial-birth abortion laws,[6] most of which are already under judicial attack, *see, e.g., Planned Parenthood of Southern Arizona v Woods*, No. CIV. 97-385-TUC-RMB, 1997 WL 679921 (D. Ariz. Oct. 27, 1997), *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997), *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997), and many, if not all, of which are vulnerable under the analysis adopted by the Sixth Circuit. Similar problems plague the other State laws that limit post-viability abortions and employ the *Casey*-approved "substantial and irreversible impairment of a major bodily function" language to protect the pregnant woman's health. Moreover,

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[6] See note 2 *supra*.

the multitude of States that have enacted post-viability laws – including those that do not contain explicit mental health exceptions for the mother – need this Court's guidance on the meaning of the required "health" exception in the context of a ban on post-viability abortions.

A. The Sixth Circuit's Vagueness Standard Renders *Casey*'s Guarantee of the States' Authority to Regulate Abortions Meaningless.

In striking down Ohio's partial-birth abortion law, the majority of the Sixth Circuit panel found that the ban of the D&X procedure encompassed "the more commonly employed D&E [Dilation and Evacuation] procedure and thereby place[d] a substantial obstacle in the path of women seeking pre-viability abortions." A-32. The majority, thus, accepted Plaintiffs' argument that Ohio's statutory definition of the D&X procedure is vague and rejected Defendants' unwavering assertion that the definition of the D&X procedure does not include or describe the D&E procedure. The majority thus "reach[es] out to strike down" the Ohio regulation instead of "interpret[ing] [it] so as to avoid difficult constitutional questions where possible." A-53-54 (Boggs, J., dissenting).[7] As noted by the dissent, the majority's application of the rules of construction is contrary to this Court's authority. *See, e.g., Arizonans for Official English v. Arizona*, 117 U.S.

[7] The Sixth Circuit's rationale differed from that of the district court's in that the Sixth Circuit did not find that a narrowly construed D&X procedure, which excluded the D&E procedure, would be nonetheless unconstitutional. A-20.

1055, 1074 (1997); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 647 (1990).

Moreover, applying a relaxed vagueness standard to facial challenges of abortion regulations allows a court to strike down a statute before a State has the opportunity to implement it and apply it constitutionally. Such a standard readily invites challenges because "words can always be said to be ambiguous." A-59 (Boggs, J., dissenting). This is especially true in the area of abortion regulation where the legislature must attempt to combine medical and legal terminology and where plaintiffs will "challenge any set of words chosen by the Ohio legislature." *Id.*; *see also Evans v. Kelley*, 977 F. Supp. 1306 (court found Michigan's partial-birth abortion law unconstitutionally vague because the term "partially vaginally delivers a living fetus" covers "the partial removal of a fetus while its heart is still beating, whether in whole or in part, [and thus] could outlaw conventional dilation and evacuation procedures in which the fetus is evacuated part by part, as well as intact D&E procedures"); *Planned Parenthood v. Woods*, 1997 WL 679921, at *10-11 (court found Arizona partial-birth abortion law unconstitutionally vague because the term "partially vaginally delivers a living fetus" could be interpreted to include D&E and induction procedures). Given the legislature's use of the term "D&X procedure," the medical community's understanding of that term, the lack of any legislative intent to restrict the D&E procedure, and the Defendants' position that the definition of the D&X procedure did not include the D&E procedure, the Sixth Circuit erred in finding the term vague. This Court should grant review to put a stop to the futile game that

many State legislatures are forced to play in an effort to find judicially acceptable language to restrict the rarely used, unnecessarily cruel abortion procedure, commonly known as partial-birth abortion.

The Sixth Circuit also erred in facially invalidating Ohio's post-viability abortion regulations on vagueness grounds. The court erred in concluding that Ohio's requirement that physicians act in good faith and exercise reasonable medical judgment in determining the viability of a fetus and in making a finding of medical necessity before aborting a viable fetus is unconstitutionally vague because the statute lacks a scienter requirement.[8]

In *Colautti*, this Court specifically declined to decide whether "under a properly drafted statute, a finding of bad faith or some other type of scienter would be required before a physician could be held criminally responsible for an erroneous determination of viability." 439 U.S. at 396. *Colautti* simply held that a scienter requirement can mitigate the vagueness of an otherwise vague law. Ohio's requirement that a physician exercise reasonable medical judgment is sufficiently clear "to afford a practical guide to permissible conduct." *United States v. Ragen*, 314 U.S. 513, 523 (1942). Moreover, such a requirement may be appropriately applied to medical decisions. *See Casey*, 505 U.S. at 879 (the "life or health of the mother" exception may be invoked only when necessary in appropriate medical judgment).

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[8] The Sixth Circuit need not have reached this issue because the Ohio law does have a scienter requirement. *See* Petition at 24-25.

The Sixth Circuit decision here seriously undermines this Court's holding in *Casey* that permits the States to regulate abortions. Unless the Court grants review, many States' desire to so regulate will be thwarted.

B. The Court of Appeals Erred in Concluding that Ohio's Post-Viability Abortion Regulations are Invalid Because They Do Not Contain a Mental Health Exception.

The court of appeals also erred in concluding that Ohio may not prohibit post-viability abortions unless there is an exception related to the mental health of the pregnant woman. This conclusion is not warranted by this Court's precedents and undermines the States' ability to regulate post-viability abortions.

Ohio's maternal health exception is substantively identical to the maternal health exception upheld in *Casey*. See discussion in Petition at 26. Moreover, neither *Doe v. Bolton*, 410 U.S. 179 (1973) nor *United States v. Vuitch*, 402 U.S. 62 (1971), upon which the court of appeals relied in making its finding, addressed the constitutional requirement for regulation of post-viability abortions. *See* Brief Amicus Curiae of a Majority of Members of the Ohio General Assembly at 19-20 & n.24. The imposition of a broad mental health exception to a prohibition on post-viability abortions could render meaningless the State's compelling interest in protecting fetal life and its right to actually proscribe post-viability abortions. *Id.*

At a minimum, review should be granted to clarify whether this Court requires a mental health exception to prohibitions of post-viability abortions.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

GRANT WOODS
Attorney General
State of Arizona
PAULA S. BICKETT
Assistant Attorney General
Counsel of Record
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-3333
Counsel for the State of Arizona

BILL PRYOR
Attorney General
State of Alabama

DANIEL E. LUNGREN
Attorney General
State of California

MICHAEL J. BOWERS
Attorney General
State of Georgia

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

RICHARD P. IEYOUB
Attorney General
State of Louisiana

MIKE MOORE
Attorney General
State of Mississippi

DON STENBERG
Attorney General
State of Nebraska

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JEFFREY B. PINE
Attorney General
State of Rhode Island

CHARLIE M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General and Reporter
State of Tennessee

JAN GRAHAM
Attorney General
State of Utah

MARK L. EARLEY
Attorney General
Commonwealth of Virginia